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Nos. 06-82, 06-84, 06-100 & 06-101

IN THE

Supreme Court of the United States

HARTFORD FIRE INSURANCE COMPANY, *Petitioner*,

v.

JASON JAY REYNOLDS, *Respondent.*

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*, *Petitioners*,

v.

CHARLES BURR, *et al.*, *Respondents.*

(captions continued on inside cover)

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE AMERICAN INSURANCE ASSOCIATION AND THE NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF PETITIONERS

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v.

AJENE EDO, *Respondent.*

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*, *Petitioners*,

v.

JULIE WILLES, *Respondent.*

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding, contrary to the decisions of at least seven other circuits, that a defendant may be found to have "willfully" violated the Fair Credit Reporting Act even if it did not have actual knowledge that its conduct violated the FCRA.

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INTEREST OF AMICI CURIAE[1]

The American Insurance Association (AIA) and the National Association of Mutual Insurance Companies (NAMIC) are national trade associations representing companies writing property and casualty insurance in every state and jurisdiction of the United States. Collectively, AIA and NAMIC members underwrite over $300 billion in premiums each year and provide coverage in a broad range of personal and commercial lines of business. Both amici regularly appear in judicial proceedings to inform courts about the implications of legal developments for their members. Both participated below as amici in support of Petitioners.

Review of the Ninth Circuit's interpretation of the Fair Credit Reporting Act (FCRA) is extremely important to both AIA and NAMIC. The Ninth Circuit's construction of the decades-old statute as imposing requirements on insurance companies that no court previously has recognized, and its indication that defendants might be found liable for "willfully" violating these unprecedented requirements, despite their good-faith compliance efforts, threaten members of the insurance industry with substantial and severe liability.

STATEMENT

In the 1990s, many insurers began using credit-based insurance scores—scores derived from credit report information—in underwriting and pricing personal lines of insurance. The use of such scores enables insurers to rate insurance risks more accurately and, thus, to avoid subsidization by some consumers of the higher risks presented by other consumers. The more accurate classification of risk trans-

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[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party authored this brief in whole or in part. No person or entity, other than amici and their members, made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties.

lates into lower premiums for many consumers and increased availability of coverage.

The FCRA requires the entity that "takes any adverse action" to issue an adverse-action notice. 15 U.S.C. § 1681m(a). Each insurance company using insurance scores made a determination of what triggered its FCRA duty to provide adverse-action notices. Separate determinations made by different insurers, often on advice of counsel, resulted in various practices. Given the absence of any court decisions interpreting the FCRA's insurance adverse-action definition—15 U.S.C. § 1681a(k)(1)(B)(i)—or any binding agency regulations, insurers conformed their practices to their good-faith interpretations of the FCRA's text and any applicable state-law requirements.

Many insurers reasonably determined that the FCRA did not require adverse-action notices upon the setting of an initial charge for insurance and, accordingly, for a number of years, did not provide notices in such circumstances. Even among those insurers that did provide notices in such "initial charge" circumstances, many did not do so in the broad "best rate" circumstances apparently now required by the court of appeals. Instead, rationally, many insurers attempted to determine when their use of insurance scores—compared to not using such scores—would adversely affect the consumer and issued adverse-action notices in those circumstances. To notify a consumer that she had been adversely affected when in fact she was helped by the use of her insurance score—even if the consumer might have been helped more had her insurance score been better—would have contradicted common sense.

Many insurance-company groups operate in an economically efficient, integrated fashion, in which a separate and distinct corporate entity provides centralized insurance, financial, technological, and management services to affiliated issuing insurers through written agreements. Often, this separate corporate entity orders consumers' insurance scores and applies previously established rating criteria to determine an appropriate premium. Sometimes, a con-

sumer's rate is affected by the placement of the consumer with one of several insurer affiliates within an integrated company group (where the affiliates offer different rating levels). Amici know of no company that believed, prior to the Ninth Circuit's decision, that entities other than the affiliated insurer who issued the relevant policy (or was responsible for denying coverage for the integrated company group altogether) must issue adverse-action notices.

In 2001 and 2002, a group of consumers initiated eight putative nationwide class actions in federal district court, alleging that Petitioners' and other insurers' adverse-action notice practices contravened the FCRA's requirements.[2] The complainants did not allege that they had suffered any actual damages, which a plaintiff must show to recover for a "negligent" violation of the FCRA. 15 U.S.C. § 1681o. Instead, the complainants sought an extraordinary remedy of statutory and punitive damages under § 1681n, which states that "[a]ny person who *willfully* fails to comply with any requirement imposed under [the Act] with respect to any consumer is liable to that consumer" for statutory damages of $100 to $1000 per violation, punitive damages, and attorneys fees. 15 U.S.C. § 1681n(a) (emphasis added).

The district court, addressing questions of national first impression, concluded in one of the cases that only the insurance affiliate to whom a consumer applies can "take" an adverse action and therefore incur an obligation to issue a notice. *Willes* v. *State Farm Fire & Cas. Co.*, CV 01-1457-BR, State Farm Pet. App. 74a-75a. In another case, the district court also held that an "adverse action" does not occur when

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[2] *Ashby* v. *FICO*, CV 01-1446-BR (filed Sept. 28, 2001); *Willes* v. *State Farm Fire & Casualty*, CV 01-1457-BR (filed Oct. 1, 2001); *Spano* v. *Safeco Ins. Co. of Or.*, CV 01-1464-BR (filed Oct. 2, 2001); *Dikeman* v. *Progressive Corp.*, CV 01-01465-BR (filed Oct. 2, 2001); *Razilov* v. *AMCO Ins. Co.*, CV 01-1466-BR (filed Oct. 3, 2001); *Rausch* v. *Hartford Fin. Servs. Group*, CV 01-1529-BR (filed Oct. 16, 2001); *Mark* v. *Valley Ins. Co.*, No. CV-01-1575-BR (filed Oct. 24, 2001); *Edo* v. *GEICO Cas. Co.*, CV 02-678-BR (filed May 24, 2002).

an insurer, on the basis of information in a consumer's credit report, charges the consumer an initial rate that is higher than the best available rate. *Mark* v. *Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1318-1319 (D. Or. 2003). Based on the same reasoning, and on appropriate motions, the district court granted summary judgment to all Petitioners in these cases. At the time they were issued, the district court's decisions on these questions were the first and only reported opinions addressing the application of the FCRA's "adverse-action" notice requirement in this insurance context. *See id; Spano* v. *SAFECO Ins. Co.*, 215 F.R.D. 601 (D. Or. 2003); *Ashby* v. *Farmers Group, Inc.*, 261 F. Supp. 2d 1213 (D. Or. 2003); *Razilov* v. *Nationwide Mut. Ins. Co.*, 242 F. Supp. 2d 977 (D. Or. 2003).

Plaintiffs in the four cases at bar appealed the adverse summary judgment rulings to the Ninth Circuit. In an opinion issued on August 4, 2005, in the consolidated *Reynolds* and *Edo* cases, a divided panel reversed the district court on each of the FCRA issues described above.[3] In particular, the Ninth Circuit held that an adverse action occurs when an insurer charges an initial rate that is higher than the consumer would have been offered if he had a better credit score, and that any insurance entity with any relation to the scoring of the consumer or a rate decision for that consumer is obligated to send an adverse-action notice. Pet. App. 48a-54a, 57a-60a.[4]

The Ninth Circuit also rejected Petitioners' arguments that they were entitled to summary judgment in any event because any alleged noncompliance was not "willfu[l]" under § 1681n. Pet. App. 65a-66a. The court concluded that the

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[3] The Court resolved the appeals of Petitioners State Farm and Safeco in unpublished dispositions issued the same day and relied therein on the decision in the consolidated *Reynolds* and *Edo* cases. This brief uses the term "decision below" to refer to the Ninth Circuit's last decision under the consolidated *Reynolds* and *Edo* caption. *See infra* 5-6.

[4] In this brief, citations to the "Pet. App." are to the Appendix to the Petition for Safeco Insurance Company unless otherwise indicated.

"willfulness" standard encompasses not only "conscious disregard" of known legal obligations, but also "recklessness." *Id.* at 62a. In addition, the court reasoned, a defendant may act "recklessly" if it adopts "unreasonable answers to issues of first impression" under the FCRA. *Id.* at 64a. Two members of the panel then went further, concluding (apparently as a matter of law) that Petitioners' interpretations were so "objectively unmeritorious" that they were reckless and thus willful. *Id.* at 64a-65a. The panel majority did not explain how its conclusion could possibly be consistent with the fact that the district court—another Article III tribunal—had concluded that the FCRA "unambiguous[ly] and plainly" supported Petitioners' construction of the statute. *Mark*, 275 F. Supp. 2d at 1318. Judge Bybee dissented, explaining that he "would not decide, as a matter of fact or law, that the insurance companies acted willfully" without further examination of that question. Pet. App. 67a-68a.

Joined by several amici, including the AIA and NAMIC, Petitioners sought rehearing en banc, noting that the Ninth Circuit's holding that adherence to an "unreasonable" legal interpretation may constitute willful noncompliance directly contradicted decisions of this Court. *See, e.g.*, Br. for Amici Curiae AIA and NAMIC in Support of Pet. for Reh'g En Banc 5-6 (citing *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988) (rejecting the proposition that "a finding of unreasonableness [would] suffice as proof of" willfulness); *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 616 (1993)). In response, the Ninth Circuit issued an amended opinion that reached the same result but removed the words "reasonable" and "unreasonable," replacing them with synonyms such as "tenable," "indefensible," and "implausible." Pet. App. 69a-99a. Judge Bybee again dissented. *Id.* at 99a-101a.

Petitioners once more sought rehearing en banc, and the Ninth Circuit issued another amended opinion. This time, however, the court responded to the petitions by retreating from its *sua sponte* finding of Petitioners' alleged willful noncompliance, instead remanding to the district court to decide whether Petitioners had "willfully" violated the

FCRA. *Id.* at 129a. The court appeared to set forth a two-step framework for addressing that question under its "reckless disregard" standard: First, a court should determine whether a defendant adopted an interpretation of the FCRA that the court (in hindsight) finds "implausible." *Id.* If so, the court must then examine the "obviousness or unreasonableness of the erroneous interpretation" and, "[i]n some cases," "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." *Id.* The court noted that it found "some" of Petitioners' FCRA interpretations "implausible," without further specification, thus requiring the additional "recklessness" inquiry on remand. *Id.* The Ninth Circuit did not, however, specify how a district court is to apply or otherwise use the "unreasonableness" or "company decision" factors, what weight should be accorded each, or when examination of the second is appropriate.

SUMMARY OF ARGUMENT

Amici agree with Petitioners that the decision below implicates a clear and entrenched circuit split on the meaning of the term "willfully" in 15 U.S.C. § 1681n, and that the Ninth Circuit adopted an erroneous interpretation of that term. Amici urge this Court to resolve that split now, in the context of these cases, for two reasons.

First, the Ninth Circuit's incorrect construction of the term "willfully" will require costly, intrusive, and needless litigation under a standard likely to breed significant confusion in the district court. Had the Ninth Circuit interpreted § 1681n correctly, Petitioners should have been entitled to judgment as a matter of law on the ground that they did not "conscious[ly] disregard" any known legal obligations under the FCRA. The positions Petitioners had followed and defended in the district court and Ninth Circuit were not only eminently reasonable, they were in fact more faithful to statutory text and structure than those the Ninth Circuit adopted. The only court previously to address those positions—the district court—not only had *agreed* with Petitioners' interpretations of the FCRA, but in fact had concluded

that the statutory text "reasonably cannot be read" to support the construction that the *Ninth Circuit* later adopted. *Mark* v. *Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003). The Ninth Circuit's novel construction of the FCRA's adverse-action notice requirement was neither known nor established prior to the decision in these cases. Petitioners' failure to comply with that unlikely construction thus could not constitute "conscious disregard" of known legal obligations under the FCRA.

Second, the Ninth Circuit's erroneous construction of § 1681n threatens substantial harm to the insurance industry. If allowed to stand, the decisions below will permit the imposition of staggering liability, with necessarily severe consequences for insurers and consumers alike. Moreover, because questions of first impression regarding the FCRA may frequently arise in other insurance contexts, insurers will face the threat of costly class-action litigation and substantial liability for any interpretation of the Act that a court later deems "implausible." The Ninth Circuit's erroneous interpretation will similarly bind the many other businesses that routinely make use of consumer credit information. This Court's review is critical to protecting personal-lines insurers and other businesses from substantial damages that Congress never intended to impose.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF SEVERAL OTHER COURTS OF APPEALS AND IS ERRONEOUS

Amici agree with Petitioners that there is a clear and well-developed split among the circuit courts on the important question of the meaning of the term "willfully" in 15 U.S.C. § 1681n. As Petitioners explain, the Ninth Circuit's decision conflicts with the holdings of at least seven other circuits, which have concluded that a defendant "willfully" violates the FCRA only if it "knowingly and intentionally committed an act in conscious disregard for the rights of the consumer." *Ausherman* v. *Bank of Am. Corp.*, 352 F.3d 896,

900 (4th Cir. 2003); *see Wantz* v. *Experian Inf. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004); *Phillips* v. *Grendahl*, 312 F.3d 357, 368 (8th Cir. 2002); *Cousin* v. *Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001); *Duncan* v. *Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Casella* v. *Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995); *Zamora* v. *Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1369 (10th Cir. 1987) (per curiam); Hartford Fire Pet. 11-15; Safeco Pet. 14-19; GEICO Pet. 10-13; State Farm Pet. 21-23. Amici also agree with Petitioners that the Ninth Circuit's interpretation of "willfully" is erroneous, because it conflicts with the FCRA's text, structure, and history, and because the Ninth Circuit's reasoning is inconsistent with decisions of this Court. *See* Pet. for Hartford Fire, at 15-20; Pet. for Safeco, at 19-23; Pet. for GEICO, at 13-24; Pet. for State Farm, at 23-30.

Petitioners comprehensively and persuasively brief these issues, and amici will not repeat those arguments here. Instead, amici submit this brief to explain why the Court should resolve the circuit split at this time and in these cases. Review is necessary now for two principal reasons. First, the Ninth Circuit's decision will require Petitioners to engage in wholly unnecessary and costly litigation in these cases under an ill-defined, standardless, and intrusive framework governing the "recklessness" inquiry. Second, the decision below threatens grave injury to the insurance industry as a whole, permitting substantial statutory damage awards in FCRA adverse-action litigation and encouraging the filing of class-action suits seeking massive damages for blameless conduct in this and other FCRA contexts.

A. The Ninth Circuit's Erroneous Decision Requires Wholly Unnecessary And Costly Litigation Under A "Willfulness" Standard That Lacks Any Definite Content

The Ninth Circuit remanded these cases based on its finding that "some" of Petitioners' interpretations of the FCRA were "implausible." Pet. App. 129a. In the Ninth Circuit's view, its hindsight observation of supposed "implausibility" triggered the need for a remand so that the dis-

trict court could now undertake an additional and searching inquiry to determine whether certain of the defendant's failures to comply with the FCRA were "reckless," thereby giving rise to statutory and punitive damages. *Id.* The Ninth Circuit explained that this "recklessness" inquiry involves at least two factors—the "unreasonableness" of the defendant's interpretation of the FCRA, and a factual inquiry into the manner in which the defendant's decision makers reached the supposedly "implausible" interpretations, based on "the testimony of the company's executives *and counsel*." *Id.* (emphasis added).

The Ninth Circuit failed to clarify the content or purpose of any step in this analysis. It did not, for example, explain what constitutes an "implausible" interpretation beyond its bare assertion that "at least some" of Petitioners' positions satisfied that standard, without further specification. The Ninth Circuit provided no guidance about how courts are to identify those interpretations that are sufficiently "implausible" to warrant further "recklessness" scrutiny but not so "unreasonable" as to justify a finding of "recklessness." And the court failed to direct what weight either of the two factors should carry or what is unique about "some cases" that requires an examination of the internal communications between an insurer and its counsel. The Ninth Circuit's decision thus breeds confusion and, until it is reversed, will require district courts confronted with class actions seeking massive statutory damages under the FCRA to apply a "recklessness" framework that defies concrete application.

B. Under The Correct Standard, All Petitioners Should Have Been Entitled To Judgment As A Matter Of Law

The standardless litigation to which the Ninth Circuit has subjected the parties and the district court is not justified. Under the correct interpretation of the term "willfully" in § 1681n, adopted by at least seven courts of appeals, the only question the court should have addressed in these cases was whether the defendants exhibited "conscious disregard"

of known legal obligations. *See supra* pp. 7-8 (citing cases adopting this standard). The answer to that question here was plainly no. The positions Petitioners adopted regarding the FCRA's adverse-action notice requirement were not only eminently reasonable, they were in fact compliant with the FCRA. The district court concluded, in the first published opinions addressing these questions, that the FCRA "unambiguous[ly] and plainly" supported Petitioners' interpretations. *Mark*, 275 F. Supp. 2d at 1318. And in any event, where, as here, "[t]here was no prior guidance to suggest that" defendants' practices were "insufficient" under the FCRA, the court "[could] not conclude that [the defendants] knowingly and intentionally" violated the FCRA "in conscious disregard of consumers' rights." *Stevenson* v. *TRW Inc.*, 987 F.2d 288, 296 (5th Cir. 1993). A closer examination of the actual FCRA statutory violations that the Ninth Circuit believes Petitioners may have "recklessly" committed demonstrates the magnitude of the court's error in these cases.

1. An "Adverse Action" Does Not Occur Whenever An Insurer Charges A Customer More Than The Insurer's Best Rate, Or When An Insurer Establishes An Initial Insurance Charge

The FCRA defines an "adverse action" in the insurance context to mean:

> a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

§ 1681a(k)(1)(B)(i). The Ninth Circuit held that the establishment of an initial charge is covered by the statutory phrase "'increase in any charge' . . . for insurance." Pet. App. 114a. In particular, the Ninth Circuit concluded that an insurer "increase[s]" a "charge" for insurance, based on a credit report, when the insurer "charg[es] a higher price for initial insurance than the insured would otherwise have been

charged because of information in a consumer credit report." *Id.* at 114a.

As Petitioners argued below, that reading runs contrary to the plain meaning of the statutory text. The Ninth Circuit recognized that "'[i]ncrease' means to make something greater." *Id.* Yet one cannot make "something" greater if that "something"—here a charge to the consumer—does not yet exist. This is not only the natural use of "increase," but also the way numerous courts, including the Ninth Circuit itself, have used the term.[5]

The Ninth Circuit rejected this customary meaning of "increase" based on a phrase found later in the "adverse action" definition: "any insurance, existing or applied for." The court assumed that Congress intended each of the various actions described in § 1681a(k)(1)(B)(i)—*e.g.*, "denial," "increase"—to modify both "existing" and "applied for" insurance. Pet. App. 115a. But that assumption is erroneous; the court's reading ignores that most of the actions described in § 1681a(k)(1)(B)(i) make sense only when read to modify either "existing" or "applied for" insurance, but not both. For example, "cancellation" naturally modifies only "existing" insurance, as in the cancellation of an existing insurance policy based on information learned from a customer's credit report. One cannot "cancel" something that does not exist. The term "denial," on the other hand, naturally modifies only insurance that a consumer has "applied for," as in the denial of an application for insurance based on information in the applicant's credit report. Thus, insurers could reasonably interpret § 1681a(k)(1)(B)(i) as requiring notices for

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[5] *See Certain Underwriters at Lloyd's* v. *Montford*, 52 F.3d 219, 221 (9th Cir. 1995) ("The insured value ... was initially set at $925,000, and was [later] increased to $1,050,000 ...."); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 558 (1962) (plurality op.); *Bernklau* v. *Principi*, 291 F.3d 795, 798 (Fed. Cir. 2002); *United States* v. *Mendez-Zamora*, 296 F.3d 1013, 1016 (10th Cir. 2002); *United States* v. *Schallom*, 998 F.2d 196, 199 (4th Cir. 1993) (per curiam); *United States* v. *Golden*, 954 F.2d 1413, 1415 (7th Cir. 1992).

- a "denial" of an "appli[cation]" for insurance,
- a "cancellation" of "existing" insurance,
- an "increase in any charge for . . . existing" insurance, or
- "a reduction or other adverse or unfavorable change in the terms of coverage or amount of . . . existing" insurance.

By stretching the term "increase" to modify both "existing" and "applied for" insurance, the Ninth Circuit effectively interpreted "increase" to mean establishing an insurance "charge" that does not yet exist and doing so at a higher level than the "charge" might have been established under different circumstances. That reading, to say the least, strains the normal, straightforward reading of the term. That much is clear from the Ninth Circuit's awkwardly phrased conclusion that the plaintiff's "rate was increased above that which it would have otherwise been because of his credit report." Pet.App. 117a.

But even if the FCRA's definition of "adverse action" did extend to "increase[s]" in "charge[s]" above a hypothetical and nonexistent charge, the Ninth Circuit's "best rate" construction—*i.e.*, that an "adverse action" occurs "whenever a consumer pays a higher rate because his credit rating is less than the top potential score," *id.* at 118a—is neither obvious nor correct. The court's interpretation does not seek to measure the effect that the use of a credit report has on an insurance charge. For example, in the Ninth Circuit's view, the application of the adverse-action notice requirement does not turn on whether the use of a credit report adversely affects a consumer versus the non-use of that credit report. Rather, the Ninth Circuit decision requires insurers to measure the adverseness of using credit-report information against a hypothetical scenario in which different credit-report information is used. Nothing in the statute suggests that construction, nor did the court attempt to ground its holding in any statutory text. Rather, the court appeared to impose the requirement as a matter of mere policy. *See id.*

The Ninth Circuit's interpretation flies in the face of common sense. In that court's view, the FCRA would require insurers to notify a consumer that she was adversely affected by the use of her credit report even if that use in fact yielded a *better* rate than had her credit report not been used at all.

Recent congressional action supports the view that both the "initial charge" and "best rate" constructions in the decisions below are erroneous. In 2003, Congress amended the FCRA to require creditors (but not insurers) to provide a separate "risk-based-pricing" notice to a consumer when the use of credit-report information results in an offer with "material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers." Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, § 311(a), 117 Stat. 1952, 1988 (codified at 15 U.S.C. § 1681m(h)(1)). This new provision expressly applies to initial offers and specifies a baseline (not "best rate") against which a creditor must measure the effect that use of credit-report information had. Congress thus knew how to link an FCRA notice requirement to the setting of an initial rate that is not as favorable as another baseline rate. That the FCRA's insurance-specific, adverse-action definition lacks similarly plain language confirms the error of the Ninth Circuit's decision. Indeed, the court's construction would hold insurers to a higher standard than lenders, even though the only clear FCRA textual requirement for the provision of notices in this context is the risk-based pricing provision for creditors added by the 2003 FCRA amendments.

2. An Insurance Affiliate That Neither Issues An Insurance Policy To A Person Nor Denies That Person Insurance Coverage Does Not "Take" An "Adverse Action" Against That Person

As Petitioners argued below, only the entity that issues the relevant insurance policy (and thus, for example,

"charge[s]" a customer for insurance or "cancel[s]" that insurance) or the entity that "deni[es]" insurance coverage "takes" one of the "adverse actions" specified in § 1681a(k)(1)(B)(i). Only that entity is therefore required under the FCRA to send the consumer an "adverse action" notice. The Ninth Circuit erred in exposing additional insurer affiliates to liability if they do not send their own additional notices to the consumer or list themselves in the original notice. The court cast this unjustifiably wide net of liability by holding that any entity with any theoretical connection to an insurance rating decision "takes" an "adverse action" within the meaning of § 1681m(a), and therefore may be held liable when a consumer is not provided an adverse-action notice.

The Ninth Circuit's conclusion was based primarily on an incorrect piecing together of multiple statutory sections. The court emphasized two phrases: "any person" in § 1681m(a), and "in connection with the underwriting of insurance" in § 1681a(k)(1)(B)(i). The Ninth Circuit apparently believed that these phrases, if read together, reveal congressional intent to require any person with any theoretical connection to the purported adverse action to issue an adverse-action notice. *See* Pet. App. 122a. The terms are found in different statutory provisions, however, and there is no indication that Congress intended the meaning the Ninth Circuit adopted.

The court also purported to ground its construction in the FCRA's purposes, but its holding runs counter to those purposes. As the Ninth Circuit noted, adverse-action notices are intended to provide consumers "important information about the benefits of improving their credit rating." Pet. App. 116a. That information is conveyed by any single entity providing an adverse-action notice, thereby informing the consumer that her credit information contributed to an adverse action. Requiring every insurance entity with any theoretical connection to the purported adverse action to issue such a notice, or requiring every such entity to be listed in a single notice, does nothing to enhance the con-

sumer's understanding. In fact, such a requirement is likely only to confuse. Under the decisions below, consumers must receive notices from numerous insurance entities (or notices listing numerous such entities) with whom the consumer has never had any interaction.

C. The Ninth Circuit's Refusal To Grant Judgment As A Matter Of Law On The Question Of Willfulness Illustrates The Serious Error In That Court's Approach

Petitioners' constructions of the FCRA adverse-action requirement were compliant with the Act and, at a minimum, were far from unreasonable. The Ninth Circuit's contrary construction of that requirement was for this reason far from preordained. For purposes of the proper "willfulness" inquiry, the rules imposed under the court's novel interpretation of the FCRA could hardly be termed known legal obligations. Accordingly, had the Ninth Circuit applied the proper legal standard when considering respondents' allegations of "willful" noncompliance, only one judgment could have been rendered. Petitioners did not knowingly and intentionally disregard any known legal obligation under the FCRA. The Ninth Circuit's remand for a costly inquiry into petitioners alleged "recklessness" should never have been ordered.

The decision below thus compellingly illustrates the serious error in the Ninth Circuit's interpretation of § 1681n. At base, the Ninth Circuit held Petitioners to have "willfully" violated the FCRA simply because the court disagreed with Petitioners' answers to questions of first impression regarding ambiguous and complex statutory provisions. The court labeled "some of" Petitioners' positions "implausible" even though the agency charged with enforcing the FCRA's requirements had issued no binding interpretation of the relevant provisions and had not for 30 years (and to amici's knowledge, still has not) brought any enforcement action against an insurance company for failing to issue adverse-action notices in these circumstances. And the court reached these conclusions even though another Article

III court had adopted precisely the positions Petitioners advanced—and had further concluded that the statutory text "reasonably cannot be read" to support the *Ninth Circuit's* construction. *Mark* v. *Valley Ins. Co.*, 275 F. Supp. 2d at 1317; *see Spano* v. *Safeco Ins. Co.*, 215 F.R.D. 601, 605-606 (D. Or. 2003); *Ashby* v. *Farmers Group, Inc.*, 261 F. Supp. 2d 1213, 1224-1226 (D. Or. 2003); *Razilov* v. *Nationwide Mut. Ins. Co.*, 242 F. Supp. 2d 977, 988-991 (D. Or. 2003).

Although the Ninth Circuit purported merely to construe the FCRA's statutory requirements, the court's reasoning resembles the type of rulemaking that is not properly the province of an Article III court, yet without the notice and opportunity for comment that normally accompanies such process. The court then imposed these requirements *ex post facto* by finding that Petitioners should have obeyed them long before they were ever announced. In doing so, the court relied more on its own policy judgments than on any "intent" reasonably attributable to Congress. A stark example is the Ninth Circuit's holding regarding who "takes" an adverse action. The court based its expansion of the adverse-action requirement to multiple insurance company affiliates based on mere conjecture that consumers probably do not "understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure." Pet. App. 124a. The court then asserted—without reference to statutory text, structure or legislative history—that Congress intended the FCRA to remedy this assumed lack of knowledge "[b]y imposing joint and several liability" on all insurance entities tangentially related to an insurance rating decision. *Id.*; *see id.* ("By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy."). From that speculative recreation of congressional intent, the Ninth Circuit then fashioned from whole cloth new obligations that

no court or agency had ever imposed.[6] And, most remarkably, the court concluded that its interpretations were the *only* "plausible" ones, accordingly holding that any insurer that failed to anticipate them had acted so recklessly that it could be subject to statutory and punitive damages, the sanction reserved for only the most severe and intentional violations of the FCRA.

The Ninth Circuit's authorization of such severe penalties in these circumstances fundamentally distorts the structure of the FCRA. The statute permits actual (compensatory) damages for "negligent" conduct, *i.e.*, when the defendant should have known, in the exercise of due care, that its practices violated the Act. § 1681o. The statute provides for statutory and punitive damages, by contrast, only when the defendant acts "willfully." By construing the term "willfully" to cover conduct that—for reasons amici explain above—does not even qualify as "negligent," the Ninth Circuit turned Congress's intent on its head. *See* Hartford Fire Pet. 16-17.

The interpretation of the term "willfully" adopted by the Ninth Circuit is dangerous for yet another reason. It will in the future require insurers to give the FCRA the broadest possible reading, in all contexts, lest a court later disagree and interpret the Act differently. As Petitioners demonstrate, that result frustrates the very purposes that the FCRA was designed to further. This effect is com-

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[6] Moreover, as Petitioner Hartford Fire argues, Hartford Fire Pet. 23-26, the Ninth Circuit engaged in the same type of unguided "interpretation" in creating rules—without urging by any party or amici, and without the benefit of briefing—respecting the information that must be contained in an adverse-action notice. *See* Pet. App. 121a. The Ninth Circuit relegated the requirements that *Congress* prescribed to a footnote, and supplemented the plain language of the statute with additional requirements that the *court* deemed important. Thus, based on little more than its own conceptions of good policy, the court held that an adverse-action notice must "at a minimum, . . . describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action, and their respective roles." *Id.*

pounded by the Ninth Circuit's creation of an entirely novel standard for adjudicating a party's "willfulness" based on terms like "untenable," "creative," "implausible," and "indefensible." Those words carry no established meaning in other legal contexts, and only the Ninth Circuit knows their intended meaning here. The result is an unknown and unknowable standard that provides regulated parties no useful guidance.

By addressing these cases, this Court can both correct the Ninth Circuit's pernicious construction and resolve the circuit split that the decisions below both highlight and exacerbate.

II. THE NINTH CIRCUIT'S DECISIONS ARE OF SUBSTANTIAL IMPORTANCE TO THE INSURANCE INDUSTRY AS A WHOLE

The issues the Ninth Circuit addressed have substantial importance not just to the parties, but to all of the insurance industry, many members of which interpreted the Act much as Petitioners did. The conclusions in the decision below expose insurers to statutory damages in situations that Congress did not intend, and to punitive damages even when they have sought in good faith to comply with the FCRA, including by seeking counsel's advice. This exposure threatens significant liability, with broad ramifications for the industry's ability to perform its important functions. Amici estimate that since the beginning of 2001, more than 150 million new personal lines insurance policies have been written. Conservatively estimating that adverse-action violations might be found for half of those policies under the Ninth Circuit's incorrect constructions of the Act, the potential liability is staggering—particularly since the FCRA, unlike the Truth In Lending Act, does not impose a cap on the total statutory damages available in class-action litigation. *Compare* 15 U.S.C. § 1681o(a)(1), *with id.* § 1640(a)(2)(B). The damages that the decision below authorizes would have a substantial and real impact on the operations of amici's members. By removing enormous amounts of capital from

the insurance system, such damages would inevitably harm the insurance marketplace.

In addition, the Ninth Circuit's decision has ramifications that extend well beyond the specific FCRA issues addressed below. The Act regulates insurers in several ways. Issues of first impression commonly arise under the FCRA, and as long as the Ninth Circuit's erroneous "willfulness" standard remains the law, insurers will face the prospect of severe class-action liability if a court later decides (in hindsight) that their answers to any unsettled FCRA questions are "implausible." The nature of the FCRA is such that any single interpretation of an FCRA requirement frequently affects millions of transactions yearly. If a court later decides that adherence to such an interpretation was reckless under the Ninth Circuit's new rule, statutory damages of $100 to $1000 might be available for each of those millions of transactions, resulting in potentially enormous liability.

This Court's review is therefore critical to protecting insurers from staggering damages that Congress never intended to impose.

CONCLUSION

For the foregoing reasons, this Court should grant the writs of certiorari and reverse the decisions of the Ninth Circuit.

Respectfully submitted.

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